

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 30, 1998

TO : William C. Schaub, Regional Director
Region 7

: Richard L. Ahearn, Regional Director
Region 9

: Martin M. Arlook, Regional Director
Region 10

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Region 12

: Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Crown Cork and Seal Company 524-0183-3367
Cases 10-CA-27288, 29128 524-0183-3375
12-CA-17196, 17525, 17983,
18009, 18085
GR-7-CA-38224
9-CA-33660
14-CA-23993

This case was resubmitted for advice as to whether the Employer has established its asserted Wright Line defenses with regard to the closures of six Union-represented plants as part of a massive consolidation and restructuring of the Employer's operation. We have evaluated the most recent memoranda submitted by Regions 10, 5, 7, 9, 12 and 14 regarding the alleged unlawful plant closings by the Employer in those Regions' respective geographic areas, and have concluded that there is a basis for issuance of Section 8(a)(3) complaints with regard to each closure. Thus, the Regions have established that protected activity was a motivating factor in the closures, and the Employer has not satisfied its burden of proving that it would have closed the plants in issue in any event for legitimate, non-discriminatory reasons.

As set forth in NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983), where the Supreme Court approved the Wright Line test, in Section 8(a)(3) cases the

General Counsel has the burden of persuading the Board by a preponderance of evidence that the employer unlawfully discriminated against protected union activity by taking an adverse action based at least in part on anti-union animus. Once the General Counsel has made that showing, the employer can avoid liability only by proving by a preponderance of the evidence that its actions were also motivated by legitimate, non-discriminatory concerns that would have caused it to take the same action even absent any unlawful motivation.

In the instant case, the General Counsel can demonstrate that, in selecting plants for closure, the Employer unlawfully discriminated against employees because of their Union affiliation and their activities in support of unionization and collective bargaining. The General Counsel's case is based on the following factors: (1) the Employer, through its corporate officials and regional managers in Atlanta and through its local managers and supervisors in the Florida, Shoreham and Cincinnati plants, threatened to close Union-represented plants (especially master contract plants) because wages there were too high and too many grievances were being filed; (2) the Employer carried out those threats by closing 12 of the 16 master contract plants; (3) in selecting those plants for closure, the Employer departed from normal business practices, e.g., it closed one of its most efficient plants (Atlanta), it transferred work to plants with production problems (Atlanta work transferred to inferior plants), it transferred work to plants that were at a greater distance from its customers (Atlanta, Cincinnati, St. Louis work transferred away from proximity to customers), and it closed a plant after beginning a substantial modernization effort (Cincinnati); (4) the Employer has provided conflicting rationales for closing some of the plants, e.g., the Employer has asserted that it closed plants because they were too large while asserting that it closed the Cincinnati and Hurlock plants because they were too small and incapable of sufficient expansion; (5) the Employer has provided plainly false and pretextual reasons for the closure of at least two of the plants (Employer asserted that Atlanta plant was closed because of inefficiency when in fact it was one of the most efficient plants, and asserted that Cincinnati plant was closed because of loss of major customer when in fact customer was lost because of the closure); and (6) the Employer has

failed to provide documentation requested by the Regions regarding alleged non-discriminatory motivations for closures (Atlanta, Shoreham, St. Louis, Orlando, Cincinnati, Hurlock).¹

The Employer has not met its Wright Line burden, because it has not demonstrated that it would have selected those plants for closure even absent its anti-union animus. To prove such a defense, an employer must provide a legitimate explanation for its conduct and substantiate its claim that that was the real reason for its conduct.²

Here, the Employer has provided incomplete, conflicting, and in some cases obviously false explanations for conduct we have determined was motivated at least in part by anti-union animus. Thus, although the Employer has shown that its plants were operating at low capacity and that it needed to close some of them, it has not demonstrated that it selected the Union master contract plants for closure for legitimate business reasons.³ In addition to its failure to provide complete and legitimate explanations, the Employer has failed to adequately substantiate its assertions, e.g., with contemporaneous documents presenting the basis for the decisions reached in selecting plants for closure.

¹ Where an employer has failed to provide documentary records within its possession to substantiate an alleged economic justification, an adverse inference may be drawn that the records would be damaging to the employer's case. See Welcome-American Fertilizer Co., 169 NLRB 862, 870 (1968). See also Intl. Union, Automobile Wkrs. v. NLRB, 459 F.2d 1329, 1344 (D.C. Cir. 1972) (adverse inference can be used to bolster prima facie discrimination case).

² See Wright Line, 251 NLRB at 1088-1089. See also Delta Gas, Inc., 282 NLRB 1315, 1317 (1987) ("a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on this reason alone").

³ See McLendon v. The Continental Group, 749 F.Supp. 582, 131 LRRM 2347, 2369 (D.N.J. 1989).

The Employer asserts as to all plants at issue that it closed the plants which saved it the most money. It variously claims that the closed plants had higher unit labor costs, less modern equipment, less efficient operations, and that it realized greater savings in capital costs than would be attained by closing other plants. But it appears that unit labor costs are a small portion of the costs of operating this type of plant. An adequate Wright Line defense would cost out the entire operation of each plant, including the costs of raw materials, shipment of the raw materials to the Employer's plants, unit labor, nonunit labor, supervision and administration, equipment maintenance and depreciation, utilities, and direct taxes. It would particularly include the costs of transportation of the finished product (painted can barrels, bottoms and tops) to customers, which would appear to be high for this type of product and even higher now that the product must be shipped greater distances.⁴ In other words, the Employer has failed to show that savings in one area were not offset by greater costs in another area as a result of the decision to close a particular plant and relocate its work elsewhere. Where the Employer relies on savings in capital costs, it has not adequately explained how it achieved greater savings by closing the selected plants. Where the Employer allegedly closed plants because they had older equipment, it has not explained how it chose which plants would be given updated machinery.

The Employer's explanation for closing the Atlanta facility, allegedly because of inefficiencies, has been determined by Region 10 to be plainly false. Thus, the Atlanta plant was one of the Employer's more efficient operations, and the Employer's cost claims are based on spurious accounting practices. Region 10 also concluded that the Employer improperly made earlier decisions to allocate new equipment and relocate work, based on Union considerations, which in turn led ultimately to the creation of a cost basis for closing the facility.⁵

⁴ Regions 10, 7 and 14 are known to have asked for such information.

⁵ [FOIA Exemption 5

The Employer's explanations regarding the closures of the other facilities at issue are also inadequate, particularly when considered against the backdrop of the substantial evidence of animus and the information uncovered by Region 10 in investigating the Employer's Wright Line defense.

With regard specifically to the Cincinnati plant closure, the Employer supplied cans to three bottlers in or near Cincinnati: Coca Cola, Pepsi and Kroger. In March 1995, the Employer began to modernize the Cincinnati plant in order to produce a newer model of can. In September 1995, the Employer informed the Union that it would close the plant. In December 1995, the Employer closed the plant, ceased producing for Coca Cola, and transferred its work for Pepsi and Kroger to Kankakee, Illinois. The Employer claims that the plant was small and had limited production capacity, that it was operating at a loss, and that it lost the Cincinnati Coca Cola business.

In fact, Region 9 has found that Coca Cola did not select another can supplier until after it learned that the Employer was shutting its Cincinnati plant.⁶ In addition, the Employer's other explanations are merely "conclusional" and are unsubstantiated. The Employer has not shown that the plant was operating at a loss, and has not explained why it would close a plant merely because it was small. Indeed, in the arbitration regarding the closure of the Hurlock, Maryland facility, the Employer claimed that it was shifting from larger to smaller plants. Furthermore, the Employer had been in the process of modernizing the plant, which would indicate it had long-term plans for its continued operation. As a result of the relocation of the Cincinnati plant's work, either the Employer or Pepsi and Kroger must absorb the higher transportation costs of shipping cans from Kankakee, Illinois to Cincinnati. On the evidence we have before us, the Employer clearly has not met its burden under Wright Line.

⁶ Where an employer gives several reasons for its conduct and, as here, one or more prove false, an inference is warranted that none of the reasons given was the real impetus for the conduct. See, e.g., Scientific Ecology Group, 317 NLRB 1259 (1995).

As to the Shoreham plant, the Employer asserts that unit wage costs at that and other master contract plants were \$10.00 per hour higher than at other plants, the "cost per line hour" at Shoreham was much higher than at the Ohio and Wisconsin facilities to which the Shoreham work was relocated, and the Employer had opened a new plant in Minnesota where it manufactured cheaper two-piece cans. However, unit labor cost is a small fraction of the Employer's overall costs, and the Employer has not made a comparison of its total costs at the facilities under consideration for closure. Also, unit labor costs were inflated for a variety of reasons, including the Employer's policy of requiring corporate resolution of all grievances of more than \$100. Furthermore, the Employer has not provided any explanation regarding the significance of the "cost per line hour" figure. Finally, the Employer has not adequately explained the relevance of the opening of the Minnesota two-piece can plant to the closure of Shoreham, nor explained why the Shoreham facility could not have been updated with the machinery needed to produce two-piece cans. The Employer has refused to provide most of the economic information requested by the Region.

As to the Orlando plant closure, the Region has determined that the Employer unlawfully failed to transfer employees to its new nearby Winter Garden location and unlawfully failed to recognize the Union at that location, in violation of Section 8(a)(3) and (5). The Region originally concluded, however, that the Employer did not discriminatorily close the Orlando facility because there was insufficient evidence to contradict the Employer's asserted business justification regarding the closure. In our view, the Employer has not provided a complete and substantiated business defense, and therefore has not met its Wright Line burden.

According to the Employer, the Orlando plant had obsolete equipment. However, much of the Orlando equipment was renovated and/or was shipped to plants in Ohio and Winter Garden, Florida. The Employer asserts that Orlando had higher unit labor costs than did Winter Garden, but does not provide an explanation of the overall cost savings of closing Orlando and moving the work to Winter Garden. The Employer asserts that the Orlando property was more valuable than the Winter Garden property, but does not

provide contemporaneous evidence as to why it decided to close a more valuable property. The Employer has presented no documentation which would establish that the asserted reasons were the real reasons for the closure.

As to St. Louis, the Employer asserts that it had removed work over a long period of time from the Saint Louis plant for "reasons of economic and product efficiency," and that after all of these work transfers the plant could no longer operate economically. The new plants, such as Portage, Indiana, to which some of the Saint Louis work was diverted, were high technology, low cost, top quality plants. According to the Employer, the cost per thousand cans at Portage is \$6.00 less than it was at St. Louis, and the cost per thousand cans at Omaha is \$1.50-\$2.00 less than at St. Louis.

Although the Employer's asserted justification seems, at first blush, to make logical economic sense, there are gaps in the Employer's explanation and it is entirely unsubstantiated. The Employer has not adequately explained the basis for the earlier work transfers, which ultimately may have led to a cost-based closure decision. Those transfers are particularly suspect in light of the information regarding prior work transfers uncovered in Region 10's investigation of the Atlanta closure. Furthermore, the Employer has admitted that it could have placed higher-technology equipment in any facility, which undercuts its argument that the St. Louis facility was closed because it had outdated equipment. The Employer has not substantiated its comparative costs, and its cost assertions have been called into question in the Region 10 investigation. Finally, the Employer's explanation does not take into account the substantial cost of transporting cans, which would have had to be higher as a result of the Employer's decision to service St. Louis customers from distant locations.

As to Hurlock, the Employer asserts that the Hurlock product could be made elsewhere at plants which had more modern machinery and which operated more cheaply, and that although the Hurlock building was currently adequate, it was 100 years old and "was otherwise of limited utility and not conducive to expansion."

Again, there are gaps in the Employer's explanation and it is entirely unsubstantiated. The Employer has not adequately explained or substantiated the comparative cost savings which assertedly led it to select the Hurlock plant for closure. Similar Employer cost-based assertions have been rejected, after analysis of Employer documentation, in the Region 10 investigation. With regard to the plant's less modern machinery, the Employer has not explained how it determined which of its plants would receive new, higher-technology equipment, which it admits could have been placed in any facility. Finally, the Employer's claim that the plant could not be expanded is not consistent with its assertion that it now prefers smaller plants over the traditional large integrated facilities.

Accordingly, we authorize the issuance of complaints, absent settlement, alleging that the six closures referenced in these charges violated Section 8(a)(3).⁷

B.J.K.

⁷ [FOIA Exemption 5